

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PHILIP PULVER and CATALOGS
ONLINE, INC., a Washington
corporation,

Plaintiffs,

v.

BATTELLE MEMORIAL
INSTITUTE, a non-profit
corporation d/b/a PACIFIC
NORTHWEST NATIONAL
LABORATORY; and JOHN DOE I
THROUGH JOHN DOE XX,

Defendant.

NO. CV-05-5028-RHW

**ORDER GRANTING
DEFENDANT'S MOTIONS TO
DISMISS AND FOR SUMMARY
JUDGMENT**

Before the Court are Defendant's Motions for Summary Judgment (Ct. Rec. 291) and to Dismiss (Ct. Rec. 320), along with numerous motions filed by both parties (Ct. Recs. 318, 323, 325-27, 328, 329, and 346). The Court heard argument on these motions on July 12, 2010. Plaintiff Pulver proceeded *pro se*; Defendant was represented by Delbert Miller. For the reasons set forth below, the Court grants Defendant's Motions to Dismiss, for Summary Judgment, and to Strike, denies the remaining pretrial motions as moot, and dismisses the case.

Motion to Dismiss

Defendant moves the Court to dismiss all Plaintiffs' remaining claims for failing to prosecute them through a licensed attorney (Ct. Rec. 320). On May 28,

**ORDER GRANTING DEFENDANT'S MOTIONS TO DISMISS AND FOR
SUMMARY JUDGMENT * 1**

1 2010, this Court granted Plaintiffs' counsels' Motion to Withdraw (Ct. Rec. 305).
2 Defendant argues that the only parties subject to the contract (the MDM and TAP
3 Agreements) are Defendant as Licensor, and Mobile Data Methods, Inc., as
4 Licensee. Therefore, Defendant's motion is premised on the basis that a
5 corporation cannot appear *pro se*.

6 "In all courts of the United States the parties may plead and conduct their
7 own cases personally or by counsel as, by the rules of such courts, respectively, are
8 permitted to manage and conduct causes therein." 28 U.S.C. § 1654. The portion
9 of the statute granting permission to the parties to "plead and conduct their own
10 cases personally" has been uniformly construed as authorizing individuals who are
11 parties to an action to appear *in propria persona*, but only where they are
12 representing themselves alone. *C.E. Pope Equity Trust v. U.S.*, 818 F.2d 696, 697
13 (9th Cir. 1987). Non-attorneys are barred from representing corporations or
14 unincorporated associations. *Church of the New Testament v. U.S.*, 783 F.2d 771,
15 773-74 (9th Cir. 1986). Such entities are, by their very nature, unable to appear in
16 person and must act through representatives. *Rowland v. Cal. Men's Colony*, 506
17 U.S. 194, 202 (1993) ("It has been the law for the better part of two centuries...that
18 a corporation may appear in federal court only through licensed counsel."); *accord*
19 *U.S. v. Unimex*, 991 F.2d 546, 549 (9th Cir. 1993) ("Counsel is essential for a
20 corporation at trial because it cannot appear *pro se*"). This proposition is also
21 recognized in the Eastern District's Local Rules ("A corporation including a
22 limited liability corporation, a partnership including a limited liability partnership,
23 an unincorporated association, or a trust may not appear in any action or
24 proceeding *pro se*." L.R. 83.6.).

25 Plaintiffs properly acknowledge that a corporation must be represented by
26 counsel (Ct. Rec. 341, p.2). The question then becomes whether Plaintiff Pulver
27 himself has standing to maintain this breach of contract claim in his individual
28 capacity.

1 When interpreting a contract, the Ninth Circuit has emphasized:

2 “[a] written contract must be read as a whole and
 3 every part interpreted with reference to the whole,
 4 with preference given to reasonable interpretations.
 5 Contract terms are to be given their ordinary meaning,
 6 and when the terms of a contract are clear, the intent
 7 of the parties must be ascertained from the contract
 8 itself. Whenever possible, the plain language of the
 9 contract should be considered first.”

10 *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003) (quoting *Klamath*

11 *Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999).

12 “A mere agent of a disclosed principal is not a party to a contract and is not liable
 13 for the principal’s nonperformance.” *Delta Mech., Inc. v. Garden City Group, Inc.*,

14 345 Fed. Appx. 232, 234 (9th Cir. 2009). “Unless otherwise agreed, a person

15 making or purporting to make a contract with another as agent for a disclosed

16 principal does not become a party to the contract.” *Legacy Wireless Servs. v.*

17 *Human Capital, L.L.C.*, 314 F. Supp. 2d 1045, 1054 (D. Or. 2004).

18 The law has generally imposed an intracorporate exhaustion requirement on
 19 shareholders [plaintiffs] seeking to vindicate a right which may properly be

20 asserted by the corporation. *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1463 (9th

21 Cir. 1995). “Where there is an injury to the corporation, the cause of action should

22 be brought by the corporation, or by the shareholders [owners] derivatively if the

23 corporation fails to act; only for separate individual damages does an individual

24 cause of action lie.” *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440

25 (9th Cir. 1979) (sole shareholder had no standing to assert either federal or state

26 law claims); *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 846 (9th Cir. 1976)

27 (majority shareholder may not assert state law claims despite economic injury to

28 him). To have standing to maintain an action, a shareholder must assert more than

personal economic injury resulting from a wrong to the corporation. *Id.*

Here, the contract at issue (“License Agreement Between Battelle Memorial

Institute and Mobile Data Methods, Inc.,” Ct. Rec. 82-2), was signed on behalf of

1 Mobile Data Methods by Pulver, titled as “President.” According to the Fourth
2 Amended Complaint, Mobile Data Methods, Inc. is a dba of Plaintiff Catalogs
3 Online, Inc. (Ct. Rec. 82, p. 2). Nowhere within the MDM and TAP Agreements is
4 Plaintiff Pulver indicated as a party in his individual capacity.

5 Similar to the facts here, *Von Brimer*’s company had a patent on a piece of
6 machinery that was subject to a contract with defendant’s company, a purchaser of
7 the patented item. 536 F.2d at 846. *Von Brimer* alleged the defendant created a
8 similar item and intentionally interfered with the contractual relationship. *Id.* *Von*
9 *Brimer*’s claim was barred in that, as an owner, he could not assert an individual
10 claim as a shareholder that should be made by his company. *Id.* The court reasoned
11 that a shareholder cannot support a personal cause of action except when the action
12 is based on a right belonging severally to him. *Id.*

13 Plaintiffs cite this Court’s January 29, 2009, Summary Judgment Order to
14 support an argument that Plaintiff Pulver is in fact the party in interest with respect
15 to the MDM and TAP Agreements.¹ In the Order’s context, the portion Plaintiffs
16 cite was merely to address a threshold matter Defendant raised. Defendant asserted
17 that Plaintiff was not the real party in interest because Plaintiff signed the license
18 agreements on behalf of nonexistent entities. Plaintiff’s response relied on a
19 general rule of law that, “absent unfair prejudice, an individual purporting to act as
20 a corporation is a party to a contract signed in the name of the nonexistent
21 corporation.” *White v. Dvorak*, 78 Wash. App. 105, 107-08 (1995).

22 Defendant asserts that “[t]he fact that Mr. Pulver signed documents as a
23 corporate representative and that, as an officer, he was the individual with whom
24 communications took place does not indicate that the corporate form was

25
26 ¹ “At all relevant points, all parties have accepted and proceeded on the
27 premise that Plaintiff Pulver is the real party in interest. Plaintiff’s signature
28 appears on all documents, Plaintiff personally conducted all dealings with
Defendant, and (with the exception of this new argument) the parties have always
accepted that Plaintiff actually held the licenses in question....” Ct. Rec. 253, p. 8.

1 disregarded by him or by Battelle. Corporations always act through individuals (Ct.
2 Rec. 321, p. 5).” Furthermore, “[r]eal party in interest and failure to join
3 indispensable parties have always been present as affirmative defenses alleged in
4 this case.”

5 The context in which the Court rejected Defendant’s threshold argument in
6 the previous summary judgment order is importantly distinct from the current
7 context. There, the question was whether Plaintiffs (including Catalogs Online,
8 Inc.) could assert a breach of contract claim where the contract was signed by a
9 non-existent corporation that is a “dba” of Catalogs Online, Inc. The question here
10 is whether Plaintiff Pulver *himself* can assert such a claim on behalf of the
11 corporation. According to *Sherman and Von Brimer*, discussed above, the Court
12 finds that he cannot. As Defendant points out, allowing Plaintiff to assert the claim
13 in his individual capacity would essentially require piercing the corporate veil, and
14 no facts here indicate that the parties disregarded the corporate form during any
15 stage of their dealings, nor does the license agreement reserve any rights to
16 Plaintiff Pulver personally.

17 The law here is simple and settled. Two propositions emerge that require the
18 Court to grant the motion: (1) a corporation cannot proceed *pro se*; and (2) an
19 individual, even a sole shareholder, lacks standing to assert a corporation’s claims
20 in her individual capacity. Therefore, the Court grants the Motion to Dismiss.

21 Alternatively, the Court grants Defendant’s Motion for Summary Judgment
22 for the reasons set forth below.

23 **Motion for Summary Judgment**

24 First, the Court grants Defendants’ Motion to Strike (Ct. Rec. 346). Plaintiff
25 has filed two Declarations in opposition to summary judgment, neither of which
26 contains admissible material as required by Fed. R. Civ. P. 56(e). The first
27 Declaration, that of Plaintiff Pulver himself (Ct. Rec. 344), consists largely of
28 Pulver’s attempted legal arguments and his opinions about the record. Because this

1 Declaration fails to include the kind of competent evidence based on personal
2 knowledge that would be admissible at trial, Defendant's motion to strike is
3 granted. The second Declaration, that of David Dillman (Ct. Rec. 345), constitutes
4 inadmissible hearsay. The declaration consists only of Dillman's conversation with
5 Plaintiff Pulver about a conversation Pulver had with a Battelle employee. Pulver's
6 statements to Dillman are out-of-court statements offered to prove the truth of the
7 matter asserted, and therefore would be inadmissible at trial as hearsay.

8 Accordingly, Defendant's Motion to Strike both Declarations is granted.

9 The Court previously declined to enter summary judgment on Plaintiffs'
10 breach of contract claim, finding that a factual dispute existed as to whether
11 Defendant delivered to Plaintiffs the results of its "best efforts" under the various
12 contracts at issue. The bulk of Defendant's renewed motion argues that Plaintiffs
13 lack any competent, admissible evidence in support of its version of the facts. In
14 their response, Plaintiffs acknowledge that they do not claim that Defendant failed
15 to exert its best efforts: "Plaintiffs do not doubt that Battelle's Dorow *exerted* best
16 efforts in developing the TAP-funding MDM in 2002-2003... Plaintiffs' Cause of
17 Action 13 has always been that Defendants violated the TAP agreement failing and
18 refusing to deliver the TAP-funded work as required the TAP agreement §1 [sic]." (Plaintiffs' Memo in Opposition, Ct. Rec. 343, p. 6).

19
20 Therefore, Defendant frames the remaining issue as whether Plaintiffs have
21 any evidence that another, workable version of MDM existed that was not
22 delivered to Plaintiffs in August 2003. Defendant argues that Plaintiffs have none.
23 Defendant asserts that the version of MDM that was demonstrated for Plaintiffs
24 earlier in 2003 was modified at Plaintiffs' direction, and that the only version that
25 existed was the one Plaintiffs received in August 2003. In response, Plaintiffs
26 assert that Defendant should have at least delivered the prior versions of MDM that
27 existed in December 2002 and May 2003.

28 After granting Defendant's Motion to Strike, the Court agrees that Plaintiffs

1 have failed to create a genuine issue of material fact with respect to the breach
2 element of this claim. It is undisputed that Defendant exerted its best efforts as
3 required, modifying the MDM software at Plaintiffs' directions over the course of
4 several months in 2003. Plaintiffs have submitted no evidence to contradict
5 Defendant's claim that it turned over to Plaintiff the results of those best efforts:
6 the only version of MDM existing at the time the funding expired. Plaintiffs have
7 offered only speculation to support their opinion that another version existed. That
8 the software functioned differently in May 2003 than it did in August 2003 is
9 explained by the continual revisions to the software done at Plaintiffs' behest.

10 Defendant also argues that Plaintiffs cannot prove the damage element of
11 their breach of contract claim, citing *Lehrer v. DSHS*, 101 Wash. App. 509, 516
12 (2000) ("Generally, a plaintiff in a contract action must prove a valid contract
13 between the parties, breach, and resulting damage."). This argument has two
14 prongs: (1) Plaintiffs expressly waived their ability to recover any consequential or
15 incidental damages; and (2) Plaintiffs have failed to proffer evidence to show any
16 kind of damages.

17 As for waiver, the Court previously examined the waiver provisions and
18 found them to be conscionable. (See Ct. Rec. 253, pp. 9-10). Plaintiffs' primary
19 argument in response to this is to cite a case that the Court finds ultimately
20 supports Defendant's argument, *Hawaiian Tel. Co. v. Microform Data Systems,*
21 *Inc.*, 829 F.2d 919, 924-25 (9th Cir. 1987). First, because this case applies
22 California law, it is only of persuasive authority here. *Hawaiian Tel.* held that a
23 contractual exclusion of consequential damages was inapplicable where a
24 defendant entirely failed to deliver a product as promised. *Id.* at 925. However, the
25 Circuit carefully distinguished this from the facts of a prior case where a seller
26 delivered a product as promised, but could not make it function as represented *Id.*
27 (citing *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. 1978)). In
28 *S.M. Wilson*, the Circuit held that such a default was "not so total and fundamental

1 as to require that [the contract's] consequential damage limitation be expunged
2 from the contract." 587 F.2d at 1375. In contrast, *Hawaiian Tel.* held that the
3 wholesale failure to deliver any product was a more fundamental breach, rendering
4 the damages exclusion inoperable.

5 Here, *Hawaiian Tel.* suggests that Defendant's breach, if one could be
6 proven, should not be considered so fundamental as to require expunging the
7 damage waiver. Just as in *S.M. Wilson*, Defendant delivered the promised product
8 but allegedly could not make it function as represented. In contrast, the seller in
9 *Hawaiian Tel.* promised to deliver a computerized directory system and utterly
10 failed to do so. Accordingly, these cases guide the Court's conclusion that the
11 damages exclusions are enforceable.

12 Finally, the Court also finds that Plaintiffs have failed to create a genuine
13 issue of fact as to the existence of damages. In a breach of contract suit for
14 damages only (as this one is; see the Fourth Amended Complaint's Prayer for
15 Relief, Ct. Rec. 82, p. 39), a court may require a plaintiff to demonstrate damages
16 and causation, and "may dismiss a breach of contract action if damages have not
17 been suffered." *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wash.
18 App. 743, 754 (2007). Plaintiffs have failed to proffer any evidence that they
19 suffered damages of any kind. Their response to Defendant's argument is simply:
20 "The casual [sic] nexus between Defendant's actions and Plaintiff's damages will
21 be proven to the jury at trial; summary judgment isn't the place for that." (Ct. Rec.
22 343). Plaintiffs also point to § 6 of Pulver's Declaration, where he merely states
23 that he retained a damages expert that he intends to produce at trial. (Ct. Rec. 344,
24 p. 22).

25 Defendant has made a showing that there is no genuine issue of fact as to the
26 existence of damages, the burden has shifted to Plaintiffs, and they have failed to
27 carry it. "Rule 56(c) mandates the entry of summary judgment against a party who
28 fails to make a showing sufficient to establish the existence of an element essential

1 to that party's case, and on which that party will bear the burden of proof at trial.”
2 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Therefore, the Court grants
3 summary judgment on this basis as well.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Defendant's Motion to Dismiss Corporate Plaintiff (Ct. Rec. 320) is
6 **GRANTED.**

7 2. Defendant's Motion for Summary Judgment (Ct. Rec. 291) is
8 **GRANTED.**

9 3. Defendant's Motion to Strike (Ct. Rec. 346) is **GRANTED.**

10 4. All remaining motions are **DENIED as moot.**

11 5. The District Court Executive is directed to enter judgment in favor of
12 Defendants and against Plaintiffs on all Plaintiffs' cause of action.

13 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
14 Order, forward copies to counsel, and **close the file.**

15 **DATED** this 3rd day of August, 2010.

16
17 *s/Robert H. Whaley*
18 **ROBERT H. WHALEY**
19 United States District Judge
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